MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Anthony D. Brown, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 6, 2021

Court of Appeals Case No. 20A-CR-2389

Appeal from the Elkhart Superior Court

The Honorable Kristine A. Osterday, Judge

Trial Court Cause No. 20D01-1904-F4-20

Bailey, Judge.

Case Summary

[1] Anthony D. Brown, Jr. ("Brown") appeals his conviction for Unlawful Possession of a Firearm by a Serious Violent Felon, a Level 4 felony.[1] He presents the sole issue of whether the trial court abused its discretion by admitting evidence obtained in violation of his constitutional protections against unlawful search and seizure found in the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. We affirm.

Facts and Procedural History

[2] At approximately 1:00 a.m. on April 7, 2019, Sergeant Nathan Lanzen of the Elkhart Police Department ("Sergeant Lanzen") was dispatched to a bar, Jimmy Squids Hideout ("Jimmy Squids"), to determine whether overcrowding necessitated calling in a fire inspector to enforce fire code compliance. In the recent past, there had been many police calls to Jimmy Squids, typically involving fights, weapons, or illegal drugs. Overcrowding had become an additional concern, with the parking lot at times becoming so congested that an emergency vehicle could not enter it.

[3] Sergeant Lanzen arrived to find that the Jimmy Squids parking lot was "over capacity," an adjoining parking lot was full, and an overflow of bar patron

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[1] Ind. Code § 35-47-4-5.

vehicles were parked at a nearby convenience store. (Tr. Vol. II, pg. 18.) As he waited for a fire inspector to arrive, Sergeant Lanzen observed several individuals running. He feared, given the history of the bar, that they were running to vehicles for weapons. According to Sergeant Lanzen, the last time he had observed people running at that particular location, "a shooting broke out in front of us." (*Id.* at 19.) Sergeant Lanzen called for backup from all available officers.

[4] At around 2:00 a.m., Elkhart Police Officer Scott Swanson ("Officer Swanson") was among the officers who responded to Sergeant Lanzen's call. Based upon what he heard over the police radio, Officer Swanson believed that an active fight was in progress and people were running to their vehicles. He understood that his role was to "patrol the parking lot and pretty much deter crime." (*Id.* at 35.) Officer Swanson parked his vehicle to block entry into, but not exit from, the Jimmy Squids parking lot. He turned off his siren and exited the vehicle.

[5] Officer Swanson approached two men standing outside a Chevrolet van. Upon his approach, Officer Swanson detected the smell of raw marijuana coming from the vehicle. The men, one of whom was Brown, were shirtless, breathing heavily, and perspiring. Officer Swanson began to engage in "just casual" conversation with the men, but then focused upon Brown, whom Officer Swanson believed he recognized as a former detainee at the St. Joseph County Jail. (*Id.* at 97.) At Officer Swanson's request, Brown produced his driver's license. As Officer Swanson held the driver's license, Officer Steven Jones ("Officer Jones") approached and directed Brown to move away from the van.

Brown, who had been standing outside the open driver's side door with his body "resting up against" the driver's seat, complied with the request. (*Id.* at 133.) Officer Jones then advised Officer Swanson that he had seen a handgun lying on the driver's seat.

[6] Officer Swanson directed Brown, who was not handcuffed, to place his hands on his head. Officer Swanson then conduced a pat down search of the exterior of Brown's clothing. When he patted the right pants pocket, Officer Swanson felt the butt of a handgun. He removed, unloaded, and secured the weapon.

[7] On April 11, 2019, the State of Indiana charged Brown with Unlawful Possession of a Firearm by a Serious Violent Felon and with misdemeanor Possession of Marijuana.[2] On November 1, 2019, Brown filed to motion to suppress evidence, alleging that he had been illegally detained before the search of his person was conducted. On February 11, 2020, the trial court conducted a hearing on the motion to suppress. On April 6, 2020, the motion was denied.

[8] On October 20, 2020, Brown was tried in a bench trial. The parties stipulated that Brown had the status of a serious violent felon prohibited from possessing a firearm, having previously been convicted of Conspiracy to Commit Murder, a Class A felony. The trial court convicted Brown of possessing a firearm and acquitted him of possessing marijuana. On November 30, 2020, Brown was sentenced to ten years of imprisonment, with four years to be served through

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[2] I.C. § 35-48-4-11.

placement in community corrections, and two years suspended to probation. Brown now appeals.

Discussion and Decision

Standard of Review

[9] Because Brown appeals following his conviction and is not appealing the trial court's order denying his motion to suppress, the issue before us is properly framed as whether the trial court erred in admitting the evidence. *Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013). The trial court has broad discretion to rule on the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Generally, evidentiary rulings are reviewed for an abuse of discretion; an abuse of discretion occurs when admission is clearly against the logic and effect of the facts and circumstances. *Id.* However, when a challenge to an evidentiary ruling is predicated on the constitutionality of a search or seizure of evidence, it raises a question of law that is reviewed de novo. *Id.* The State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional. *State v. Rager*, 883 N.E.2d 136, 139 (Ind. Ct. App. 2008). To deter state actors from violating the prohibition against unreasonable searches and seizures, evidence obtained in violation of the Fourth Amendment generally is not admissible in a prosecution of the citizen whose right was violated. *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013).

[10] Brown raises claims under both the federal and state constitutions. Although the Fourth Amendment of the United States Constitution and Article 1, Section

11 of the Indiana Constitution contain textually similar language, each must be separately analyzed. *Marshall v. State*, 117 N.E.3d 1254, 1259 (Ind. 2019).

Fourth Amendment

[11] Brown argues that the handgun recovered from his pocket was inadmissible because "the officer's approach and request for identification constituted an investigatory stop, and there was no reasonable suspicion that [he] was engaged in criminal activity." Appellant's Brief at 12. The State responds: "the initial encounter between Brown and Officer Swanson was consensual. And before Brown was seized and searched, Officer Swanson had reasonable suspicion to believe that crime was afoot and reasonably believed that Brown was armed and dangerous." Appellee's Brief at 17.

[12] The Fourth Amendment guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Not every encounter between a police officer and a citizen amounts to a seizure requiring objective justification. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000). It is simply not the purpose of the Fourth Amendment to eliminate all contact between police and the citizenry. *U.S. v. Mendenhall*, 446 U.S. 544, 553 (1980). And the mere approach by law

enforcement officers does not constitute a seizure. *Florida v. Rover*, 460 U.S. 491, 497 (1983). A person is "seized" only when, by means of physical force or a show of authority, his or her freedom of movement is restrained. *State v. Lefevers*, 844 N.E.2d 508, 513 (Ind. Ct. App. 2006).

[13] There are three levels of police investigation, two of which implicate the Fourth Amendment. *Overstreet*, 724 N.E.2d at 663. First, the Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. *Id.* Second, pursuant to Fourth Amendment jurisprudence, the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity has or is about to occur. *Id.* Finally, the third level of investigation occurs when a police officer makes a casual and brief inquiry of a citizen, which involves neither an arrest nor a stop. *Id.* This is a consensual encounter that does not implicate Fourth Amendment considerations. *Id.*

[14] According to Brown, his encounter with Officer Swanson was not consensual. Rather, Brown observes, after police responded to a call about possible conditions of overcrowding, he was singled out and asked to produce identification. Thus, he contends that the stop should be considered an investigative stop, known as a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968). An officer can stop a person if the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Id.* at 30. While this stop requires less than probable cause, an

officer's reasonable suspicion demands more than just a hunch, that is: "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21.

[15] Recently, in *Johnson v. State*, 157 N.E.3d 1199 (Ind. 2020), our Indiana Supreme Court found that the Fourth Amendment was implicated and the *Terry* requirement of reasonable suspicion applied to an encounter between a casino patron and a Gaming Enforcement Agent ("the Agent"). Security officers had received a report that a patron had been approached by an individual inside the casino, making an offer to sell something that the patron understood to involve cocaine or, less likely, prostitution. *See id.* at 1202. A supervisor reviewed security footage and notified the Agent; the Agent located Johnson, who "voluntarily" proceeded to the gaming commission's interview room. *Id*. The encounter was described as one "along the lines of a *Terry* stop." *Id.* at 1203. In *Johnson*, there were three issues relevant to suppression: whether the Agent had justification for the *Terry* stop; whether a *Terry* frisk was permitted; and whether seizure of suspected contraband from the subject's pocket was permissible. *Id.*

[16] The encounter here is similar to the *Johnson* interaction, as it involved law enforcement initiation of contact with a business patron that escalated to a weapons frisk and culminated in seizure of an object. When Officer Swanson arrived and blocked the parking lot entry, but not the exit, there were several bar patrons present, many of whom were likely preparing to leave. Brown

stood outside one of the vehicles, partially resting against the driver's seat. If it was Brown's intention to drive away, he was interrupted in that purpose when he handed over his driver's license. Officer Swanson had approached Brown in particular, mentioned that he thought Brown had been in a jail where the officer had previously worked, and asked Brown to produce identification. The circumstances of this encounter, "along the lines of a *Terry* stop," *Johnson*, 157 N.E.3d at 1203, cause us to agree with Brown that a *Terry* inquiry is appropriate.

[17] However, we disagree with his contention that Officer Swanson lacked any reasonable suspicion of criminality when he focused upon Brown. By that time, the information available to the responding officers involved more than reported overcrowding. There had been some police radio discussion of events at Jimmy Squids and Officer Swanson had been made aware of "people running back to their cars" after a "large fight." (Tr. Vol. II, pg. 60.) Officer Swanson observed that Brown and the man nearest to Brown were both shirtless; they were sweating and breathing heavily. They gave an appearance of having been involved in a physical altercation.[3] Officer Swanson detected an odor of raw marijuana. The officer had reasonable suspicion to stop Brown under *Terry*.

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[3] The State also claims that "Brown acted suspiciously by raising his hands above his waist in a manner that indicated he was trying to show the officer his hands." Appellee's Brief at 15. We strenuously reject the idea that such behavior is suspicious. Indeed, it might be characterized as prudent behavior, in the interest of one's self-preservation, to keep one's hands visible in a citizen-police encounter.

[18] After making a *Terry* stop, an officer may, if he has reasonable fear that a suspect is armed and dangerous, frisk the outer clothing of that suspect to try to find weapons. *Terry*, 392 U.S. at 27. The purpose of this protective search "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (quotation omitted). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. To determine whether an officer acted reasonably, we consider the specific, reasonable inferences that the officer, in light of his experience, can draw from the facts. *Id.* The encounter took place during early morning hours, in the parking lot of a bar where police were called nearly every Friday and Saturday night. Officer Swanson found Brown's appearance to be consistent with his having been in a physical altercation. He detected a smell of raw marijuana. Also, by the time that Officer Swanson frisked Brown, he had learned that there was a gun on the driver's seat of the vehicle where Brown stood. The facts known to Officer Swanson supported his limited search of Brown for officer safety.

[19] As Officer Swanson began to pat down Brown's exterior clothing, he felt the butt of a handgun. Officer Swanson testified that the identity of the object was readily apparent to him, based upon his experience and training; Brown has not contended otherwise. We observe that Brown has not challenged on constitutional grounds the officer's decision to remove the loaded weapon once

it was discovered. The handgun was not inadmissible on Fourth Amendment grounds.

Indiana Constitution

[20] Brown also asserts that "the request for identification and subsequent pat down search" was a violation of Article 1, Section 11 of the Indiana Constitution, which "safeguards the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure.'" *Watkins v. State*, 85 N.E.3d 597, 600 (Ind. 2017). Brown argues that Officer Swanson had no reason to be suspicious of him as he simply stood beside an open vehicle with his shirt off, having just exited a hot, overcrowded bar.

> Our analysis of claims under Section 11 does not demand that we look to the same requirements as those examined under the United States Constitution; rather, our investigation under Section 11 places the burden on the State to demonstrate that each relevant intrusion was reasonable in light of the totality of the circumstances.

Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006). Section 11 is to be given "a liberal construction to angle in favor of protection for individuals from unreasonable intrusions on privacy." *Id.*

[21] Under a state constitutional analysis, we make reasonable suspicion determinations "by looking at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *State v. Renzulli*, 958 N.E.2d 1143, 1147 (Ind.

2011) (citations and quotations omitted). Officer Swanson had familiarity with the history of Jimmy Squids. Police dispatches to Jimmy Squids were common, typically occurring at least once each Friday and Saturday night. Officer Swanson arrived at the bar parking lot during early morning hours, having been advised of the latest outburst – fighting and patrons running toward their vehicles. He had every reason to fear that gunfire might erupt. The officer encountered two men without shirts, sweating, and breathing heavily, in other words, appearing to have been involved in a physical altercation. From the open vehicle next to Brown, the smell of raw marijuana emanated. The totality of these circumstances is such that Officer Swanson would have had "a particularized and objective basis for suspecting legal wrongdoing," comporting with the Indiana Constitution. *Id.*

[22] Finally, Brown contends that "the more intrusive pat down search was also not reasonable [when] there was no suspicion or concern that a violation of any kind had occurred." Appellant's Brief at 18-19. We observe that the circumstances were not stagnant; rather, a gun was discovered on the vehicle seat in close proximity to Brown. Consequently, Brown experienced an intrusion into his liberty beyond being interrupted in his activity and asked to produce identification.

[23] "[T]he totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure." *Litchfield v. State*, 824 N.E.2d 356, 360 (Ind. 2005). Our determination of the reasonableness of a

search or seizure under Section 11 often "turn[s] on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* at 361.

[24] Here, officers knew that bar fighting had occurred and patrons had run for their vehicles. They had a very high degree of concern that patrons might be retrieving weapons and the situation could escalate to gun battle. They were highly incentivized to identify any combatants and de-escalate the situation. Brown exhibited the appearance of one who had been in a physical altercation, and it was soon discovered that a firearm lay on the driver's seat alongside where Brown was standing. A pat down search of exterior clothing was a minimal intrusion into Brown's liberty, given the discovery of the handgun in the vehicle and the exigencies of the situation. The law enforcement need was high, with Officer Swanson having to act for the safety of himself, other officers who were present, and a crowd of people. The pat down search was reasonable under the Indiana Constitution.

Conclusion

[25] Under both the federal and state constitutions, the police had reasonable suspicion to conduct the stop, which was along the lines of a *Terry* stop, of Brown. The pat down search for officer safety did not exceed the permissible scope of a *Terry* stop. Nor was it unreasonable under the Indiana Constitution.

Therefore, the trial court did not err when it allowed into evidence the firearm found in the search conducted after the stop.

[26] Affirmed.

Crone, J., and Pyle, J., concur.